

Employment Law Trends and Updates

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Topics

- Telecommuting
 - Fair Labor Standards Act
 - Workers' Compensation
 - Americans with Disabilities Act
 - Trade Secrets and Company Info
- Ohio's Minimum Wage Law
- Ohio's Anti-Smoking Law
- Watch to watch for in 2008

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What is Telecommuting?

- Working anywhere other than the company's main office, including:
 - Workers' homes
 - Client's facilities
 - Hotel room
 - Coffee shop



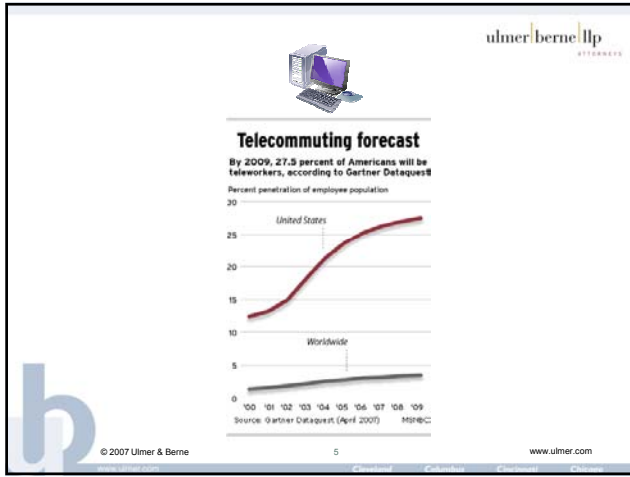
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Who Is Telecommuting?

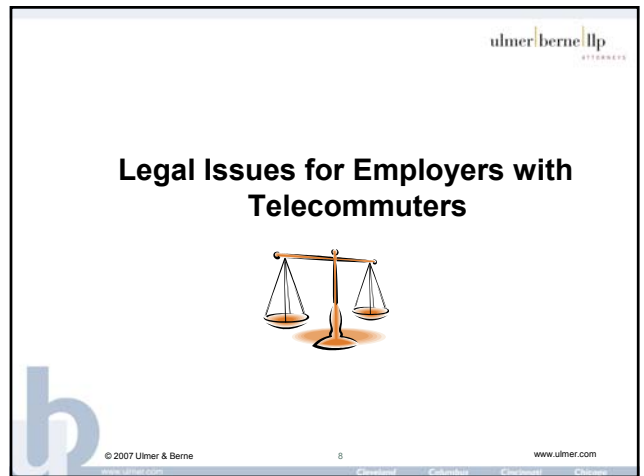
- 45 million Americans telecommute occasionally
- 22.2 million Americans telecommute regularly
- Common for sales people who rarely need to work in an office environment
- Common in high-tech industries

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- ### What Are the Benefits of Telecommuting?
- Lower real estate and overhead expenses like power consumption, utility bills, etc.
 - Improved employee morale due to time and money saved from traveling to and from work, lower stress, etc.
 - Increased employee productivity due to fewer distractions initiated by co-workers and lower stress
 - Reduced employee turnover
 - Business continuity in case of terror attack, pandemic, or other disaster
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- ### What Is the Downside to Telecommuting?
- Loss of employee contact, collaboration, and ability to manage
 - Cost of providing office equipment
 - Legal issues
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Fair Labor Standards Act

Legal Issues for Telecommuters:

- Is the employee exempt or non-exempt? This is not always an easy question to answer, and misclassified employees are expensive!
 - Examples:
 - In 2005, Merrill Lynch paid \$37 million to settle a lawsuit where stockbrokers in California alleged they were non-exempt
 - In 2006, Cross Country Healthcare agreed to pay \$10 million to settle a wage and hour class action
 - Damages add up quickly—for 25 employees who work 8.5 hours every day for 2 years and earn \$10/hour
 - Weekly overtime due is \$37.50 (\$15/hr times 2.5 hrs)
 - Times 25 employees is \$93,750—liquidated/double damages are available, which would be \$187,500.
 - Plus attorneys fees of approximately \$50,000
 - Total-\$237,500 (liquidated damages + attorney fees)

Fair Labor Standards Act

- 3 categories of exempt employees
 - Executive—"primary duty" is management of the enterprise, department or subdivision; regularly directs 2 or more employees; and has authority to hire and fire or make recommendations that are given "particular weight"
 - Administrative—primary duty is performing office or non-manual work directly related to management or general business operations; must include the exercise of discretion and independent judgment on significant matters
 - Professional—primary duty is work requiring knowledge of advanced type
- Miscellaneous provisions, such as computer employees

Fair Labor Standards Act

- When is the employee working? Keep track! All overtime must be paid, even if it was unauthorized. Be careful to include pre-and post-work activities, such as phone calls to supervisors. Non-exempt employees must be paid minimum wage plus overtime if they work over 40 hours per week.

Workers' Compensation

- Ohio requires most employers to carry workers' compensation insurance that provides coverage for employees who are injured during working hours and at the workplace.
- Employees are generally covered by workers' compensation insurance regardless of the location of the worksite. Therefore, the same rules that apply on the employer's premises apply at the telecommuter's home.

Workers' Compensation

- Consider requiring employees to designate one room as the home office and/or to restrict the hours that the employee can work. These restrictions will help you determine if an injury is related to work.
- Example from a real case—while retrieving mail from his home mailbox, employee fell on the ice and injured his hip. He filed workers' compensation claim—and won.
 - Facts in employee's favor:
 - Employee was sales representative who worked primarily from home
 - He was traveling from one worksite to another at the time of the injury
 - He frequently received work-related mail at his home mailbox.

Bentz v. Liberty Northwest (S.C. Mont. 2002), 57 P.3d 832.

Americans with Disabilities Act

- What the ADA requires—an employee with 15 or more employees must provide a "reasonable accommodation" to any "qualified individual" with a "disability."
 - "disability" means an impairment that substantially limits a major life activity, a record of such an impairment, or being regarded as having such an impairment
 - "qualified individual" is someone who, with or without a "reasonable accommodation" can perform the "essential functions" of a job
 - "essential functions" are the fundamental job duties as evidenced by employer's judgment, written job descriptions, time spent on task, consequences of not doing the task, and work experience of others in job

Americans with Disabilities Act

- Possible legal issue—is working at home or telecommuting from a different location a "reasonable accommodation?" Maybe.

Americans with Disabilities Act

- Examples from real cases—was working at home a reasonable accommodation?
 - No—summary judgment for employer because the employer showed that working on-site was an essential function such that working at home was not reasonable.
 - Facts in employer's favor
 - No other employee in job (service coordinator) worked at home
 - Evidence that employer could not adequately supervise employee working at home
 - Evidence that teamwork (such as covering for other employees) was necessary

Mason v. Avaya Communications, Inc. (10th Cir. 2004), 357 F.3d 1114.

Americans with Disabilities Act

- Maybe—employer lost summary judgment and case set for jury to decide whether working at home was a “reasonable accommodation.”
 - Facts in employee’s favor
 - Other employees in job (medical transcriptionist) worked from home
 - Employer denied employee’s request for reasons relating to her disability

• *Humphrey v. Memorial Hospitals* (9th Cir. 2001), 239 F.3d 1128.

Protection of Trade Secrets and Confidential Company Information

- What are trade secrets?
 - According to R.C. 1333.61, a trade secret is information . . . that satisfies both of the following:
 - derives independent economic value, actual or potential, from not being generally known to, or not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use
 - it is the subject of efforts that are reasonable under the circumstances to maintain its secrecy

Protection of Trade Secrets and Confidential Company Information

- Consider non-competition agreements
 - Factors courts consider when deciding whether a non-compete is reasonable (i.e., will be enforced)
 - Are there reasonable time and geographic limits?
 - Does the employee represent a sole contact with certain customers?
 - Does the employee possess confidential information or trade secrets?
 - Does the covenant seek to eliminate competition that would be unfair to the employer or merely seek to eliminate ordinary competition?
 - Does the covenant seek to stifle the inherent skill and experience of the employee?

Protection of Trade Secrets and Confidential Company Information

- Factors courts consider when deciding whether a non-compete is reasonable (i.e., will be enforced) (cont'd)
 - Is the benefit to the employer disproportionate to the detriment of the employee?
 - Does the covenant act as a bar to the employee’s sole means of support?
 - Were the talents which the covenant seeks to restrict actually developed while the employee was with the employer?
 - Is the forbidden employment merely incidental to the main employment?

Protection of Trade Secrets and Confidential Company Information

- Remote access to your IT system raises numerous security issues, so you must consult an IT specialist who can help you safeguard against unauthorized access to your system
- Make sure you have adequate protection against viruses that can infect your system if they somehow infiltrate a telecommuter's computer

Protection of Trade Secrets and Confidential Company Information

- Decide which documents or data telecommuters may have access to or remove from company premises—and keep track of who has it
- Specify what steps telecommuters must take to protect confidential information (i.e., use of additional passwords on the computer, locked file drawers, shredding machines, etc.)



You Don't Want This Press!

**Ohio changes policies after massive data theft
Disk with info on 64,000 state employees was
taken from intern's car**

<http://www.msnbc.msn.com/id/19247094/>
Updated: 9:08 p.m. ET June 16, 2007

Boeing worker data on stolen laptop

By Lisa Chiu
Seattle Times business reporter
Friday, April 21, 2006, 12:00 a.m. Pacific
http://seattletimes.nwsource.com/cgi-bin/PrintStory.pl?document_id=2002943706&zsection_id=2002119995&slug=boeinglaptop21&date=20060421

Privacy Rights of Telecommuters

- Employees working from home have a greater expectation of privacy than employees who work on your property
- If you intend to conduct home inspections, notify the employee how this will be done
- You might want to inspect to ensure that the employee has a separate work location and company property is being used properly and safely – especially if the employer owns the electronic equipment and wants to ensure that it is properly used and maintained
- Have telecommuters acknowledge in writing that they are subject to your policies concerning use of company e-mail, voicemail, and the Internet for personal use

What Is the Best Way for an Employer to Protect Itself?

- Have a policy and conduct proper training
 - Policy should address:
 - What job titles and which types of employees are eligible for telecommuting (i.e., five years of tenure with the company and two consecutive years of above-average performance appraisals)
 - Performance standards and effect on promotional opportunities
 - Method of communicating with supervisors
 - Expectation for meetings held on company premises
 - Who will supply equipment, furniture, supplies, insurance, etc.

What Is the Best Way for an Employer to Protect Itself?

- IT requirements like minimum download and upload speeds, firewalls, and other data security measures
- Confidentiality and security of company information
- Safety and health issues
- Timekeeping procedures and expected work hours
- Liability for injuries
- What will happen at the end of the relationship

Ohio's Minimum Wage

- Effective 1/1/07 - ↑ in Ohio from \$5.15 to \$6.85
- Four exceptions:
 - 1) Employees under 16 years of age
 - 2) Businesses with annual gross receipts < \$250,000
 - 3) Employees who are paid tips – may be paid not less than ½ the new minimum wage if their hourly wage in addition to such tips equals at least the minimum wage
 - 4) If employee is family member of family-owned and operated employer

Ohio's Minimum Wage— Recordkeeping Requirements

- Employers must keep records of name, address, occupation, pay rate, hours worked for each day worked and amounts paid to an employee for at least three years following last date of employment
- The information must be provided without charge to employees who request it—or “anyone acting on their behalf,” such as their attorney

Ohio's Anti-Smoking Law

- No place of employment may permit smoking in place of employment regardless of time of day or presence of other employees—also cannot smoke in company or private vehicles when used for company purposes and a non-smoker is present
- Proprietors must ensure that tobacco smoke does not enter areas in which smoking is prohibited through entrances, windows, ventilation systems, etc.
- Employers may not retaliate against an individual for exercising any right under the new law (i.e., reporting a violation)
- Lack of intent to violate law is not a defense

2008: What to Watch for:

- Companies implementing policies prohibiting employees from smoking anywhere (work, car, home)
 - Improve health/reduce healthcare costs
 - Example: Cleveland Clinic announced it will no longer hire smokers beginning 9/1/07
 - As of now – lawful to do so in Ohio
 - Other states – may not be lawful

2008: What to Watch for:

- New Protected Classes?
 - Employment Non-Discrimination Act of 2007 is pending in Congress
 - Would prohibit discrimination on the basis of perceived or actual
 - Gender identity
 - Sexual orientation
 - Genetic Information Nondiscrimination Act of 2007 is pending in Congress
 - Would prohibit use of genetic information in hiring, firing or promotional decisions

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PRACTICES / INDUSTRIES

Litigation

Employment & Labor

Business

Employment & Labor

Financial Services

Employment & Labor

AREAS OF CONCENTRATION

Labor and Employment Law
Civil Rights Litigation

EDUCATION

Centre College (B.A., *summa cum laude*, 1995) Phi Beta Kappa
University of Virginia (M.A., 1998)
University of Cincinnati College of Law
(J.D., 2002)

AT A GLANCE

Jennifer assists employers in defending claims of wrongful discharge, harassment and discrimination. A member of the Employment & Labor and Business Litigation Groups, Jennifer has experience handling all aspects of state and federal litigation, including pleadings and motion practice, discovery and trial preparation, as well as resolving disputes through mediation.

REPRESENTATIVE EXPERIENCE

Litigates claims of wrongful discharge, harassment and discrimination on behalf of employers.

Experience defending charges of discrimination before the Equal Employment Opportunity Commission and the Ohio Civil Rights Commission.

Counsels employers on employment practices, such as handbooks, policies, and personnel decisions.

Experience defending business entities in contract disputes and against a variety of claims, including breach of fiduciary duty, legal malpractice, and medical malpractice.

HONORS & DISTINCTIONS

Named an "Ohio Super Lawyer Rising Star" in a survey of Ohio lawyers by *Law & Politics* and *Cincinnati* magazines (July 2007)

PUBLICATIONS & PRESENTATIONS

Presentations

"Absent Employees: Employer Responsibilities Regarding Medical and Military Leaves," Ulmer & Berne LLP Employment & Labor Seminar (2006)

"Family Medical Leave Act: Recent Case Developments and Its Interactions with the ADA," Ulmer & Berne LLP Employment & Labor Seminar (2005)



Jennifer Paschen Bergeron



PROFESSIONAL AFFILIATIONS

Ohio State Bar Association

Cincinnati Bar Association (*CLE Coordinator, Women Lawyers Committee 2005-2007; Secretary, Women Lawyers Committee 2003-2005*)

ADMISSIONS

State of Ohio

U.S. District Court, Southern District of Ohio

Ulmer & Berne LLP Profile

www.ulmer.com

The Firm

At Ulmer & Berne, our goal is exceptional service and value for every single client. We understand that each client represents an important relationship to us, whether that client is an individual, a growing business or Fortune 500 company. Since our founding in 1908, Ulmer & Berne has grown to its present position as a leading statewide and regional Firm. Our attorneys in Cleveland, Cincinnati, Columbus and Chicago deliver exceptional service and value on a local, regional and national basis.

Our clients operate within an increasingly complex world. Their legal needs are increasingly complex as well. To meet those challenges, our practice groups combine in-depth legal expertise with real-world business savvy. We pride ourselves on developing a genuine understanding of our clients and their needs. Our mission is to deliver exceptional service and value to help our clients meet their goals. The lawyers of Ulmer & Berne serve as counselors to a wide range of clients that includes individuals, sole proprietorships, public and privately held companies, multinational corporations, financial institutions, public bodies and nonprofit organizations. We cherish our long-standing relationships with many of our clients at the same time that we welcome new clients to the Firm.

Background

In a small Cleveland office in 1908, business lawyers Jacob Ulmer and Joseph Berne entered into practice as Ulmer & Berne. Since our founding, the remarkable growth in attorney numbers, offices and practice group areas has reflected Ulmer & Berne's continued commitment to not only meet our clients' changing needs, but to exceed their expectations.

In 1948, Ulmer & Berne grew to seven attorneys and gained the moniker of Ulmer, Berne, Gordon & Glickman. A merger with the law firm of Laronge & Curtis in 1953 brought the total to 10 attorneys. After three more decades of significant growth and success in Cleveland, the Columbus office of Ulmer & Berne opened in 1989, extending the Firm's reach into new markets and business communities, most notably with its highly regarded environmental law practice. By 1998, Ulmer & Berne attorneys numbered more than 100.

More expansion was needed to respond to an increasingly sophisticated state, regional and national clientele, and the Cincinnati office was opened in 2000. Formerly the Cincinnati firm of Walker & Chatfield and originally founded in the mid-1960s, the Cincinnati office enjoys national success with its leading pharmaceutical and mass tort litigation practice. Our Chicago office opened privately in 2001 and officially in 2002, further enhancing the Firm's substantial financial services industry practice.

Today, Ulmer & Berne is one of the largest law firms in Ohio. We have approximately 180 lawyers among our Cleveland, Columbus, Cincinnati and Chicago offices. However, despite our standing as one of the largest law firms in the region, we still hold strong to the ideals of



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Ulmer & Berne LLP Profile

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our two founders. Ulmer & Berne continues to provide the reach, depth, presence and trust that our clients have relied on for nearly 100 years.

Areas of Practice

Many lawyers in the Firm practice in one or more areas of law. We have found that the concentration of lawyers in the Firm by practice area has enabled us to provide high quality service to our clients in a very efficient manner. The following is a list of Ulmer & Berne LLP practice concentrations:

Banking and Commercial Lending
Broker-Dealer & Securities Litigation
Business Law
Complex Business Litigation
Class Action Defense
Construction Law
Corporate Finance and Securities
Corporate Restructuring & Creditors'
Rights
e-Business
Employee Benefits
Employment and Labor Law
Environmental Law
Fair Housing
Financial Institutions
Fire Litigation
Health Care

Intellectual Property and Technology
International
Liability Defense
Mass Torts
Mergers and Acquisitions
Nonprofit
Pharmaceutical and Medical Device
Litigation
Product Liability
Property Insurance
Public Law
Real Estate
Subrogation
Tax
Toxic Tort Defense
Trusts and Estates
Workers' Compensation Defense



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